



INTERIOR BOARD OF INDIAN APPEALS

Ted Lopez, et al. v. Acting Aberdeen Area Director, Bureau of Indian Affairs

29 IBIA 5 (12/12/1995)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TED LOPEZ, LUKE LOPEZ, and DAVID LOPEZ

v.

ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-74-A

Decided December 12, 1995

Appeal from a decision assessing damages for overstocking a range unit.

Affirmed.

1. Board of Indian Appeals: Generally--Indians: Individual Trust or Restricted Lands: Generally--Indians: Leases and Permits: Farming and Grazing

In some circumstances, where individual Indian landowners have authorized the inclusion of their land in a grazing unit and have also authorized a Bureau of Indian Affairs Superintendent to take certain actions on their behalf, the landowners may be deemed to have authorized the Superintendent to represent them in an appeal before the Board of Indian Appeals. However, the Board must determine, on a case-by-case basis, whether such representation is appropriate.

APPEARANCES: Cheryl F. Laurenz-Bogue, Esq., Dupree, South Dakota; Thomas C. Jacobs, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Ft. Snelling, Minnesota, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Ted Lopez, Luke Lopez, and David Lopez seek review of a December 23, 1994, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming an assessment of damages for overstocking range units 229 and 446 on the Standing Rock Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellants are members of the Standing Rock Sioux Tribe. They presently hold grazing permits for Standing Rock range units 229, 273, 373, and 446. They apparently held permits for these same range units, as well as range unit 705, during the previous permit period. ^{1/}

^{1/} Appellants' current permits for range units 229 and 446 are for a term beginning Nov. 1, 1993, and ending Oct. 31, 1997. For purposes of this

In September 1992, employees of the Standing Rock Agency, BIA, observed overstocking on range unit 229. 2/ It does not appear that any action was taken against appellants at that time.

In August and September 1993, BIA employees found overstocking on range units 229, 273, 446, and 705. In August 1993, the Superintendent wrote to appellant Ted Lopez about range unit 273, directing him to remove the excess livestock within 5 days. The record does not show whether the excess livestock were removed from range unit 273 or whether BIA wrote to appellants or took any action at that time concerning the other range units found to be overstocked.

In June 1994, BIA found overstocking on range units 229, 273, 373, and 446. By letter of July 1, 1994, the Superintendent notified appellants of the overstocking, directed them to remove the excess livestock, and informed them of their liability for liquidated damages under the Range Control Stipulations incorporated into their grazing permits. 3/ When appellants had taken no action by July 26, 1994, the Superintendent again wrote to them. His letter stated:

[Y]ou have 10 days from date of receiving this notice to notify this office as to what actions are being taken by you and to review the liability of the violations. If no action is taken by the 10 days, bills will be issued for the violations as follows:

Range Unit 229	\$ 5,054.40	Overstocking
Range Unit 273	12,495.60	Overstocking
Range Unit 373	14,601.60	Overstocking
Range Unit 446	<u>1,263.60</u>	Overstocking
Total \$33,415.20		

After receiving the Superintendent's July 26, 1994, letter, Ted Lopez met with staff of the Standing Rock Agency, BIA, to discuss the matter. An agreement was reached whereby Lopez agreed to pay \$3,720.60 in damages and

fn. 1 (continued)

appeal, the Board assumes that all of appellants' current permits are for the same term.

Range unit 705 was combined with range unit 373, apparently sometime in 1994.

2/ Each grazing permit specifies the maximum number of livestock which may be grazed on the unit covered by the permit. Under the current permits for range units 229 and 446, 138 and 234 head, respectively, are allowed.

3/ The permits provide, in paragraph 5 of a section entitled "Special Permit Requirements and Provisions," that they are subject to the Range Control Stipulations. Appellants signed the permits under a statement reading: "I accept this permit and the attached stipulations."

The relevant provision of the Range Control Stipulations is quoted and discussed below.

further agreed to bring the stocking on all of appellants' range units into compliance with their permits by no later than August 20, 1994. ^{4/}

On October 24, 25, and 26, 1994, Agency staff conducted another compliance check on the range units permitted to appellants. They found overstocking on range units 229 and 446 but not on range units 273 and 373. The Superintendent wrote to appellants on October 27, 1994, informing them that they were liable for \$26,535.60 in damages for the overstocking of range units 229 and 446.

On November 14, 1994, the Superintendent again wrote to appellants, stating that he was reducing the damages to \$9,828 because he had determined (1) that horses comprising 9 animal units should not be counted because they belonged to another family and (2) that 110 cattle, which had been found in a corral on range unit 229, should not be counted. He enclosed two bills, one in the amount of \$1,965.60 for overstocking range unit 229 and the other in the amount of \$7,862.40 for overstocking range unit 446. The final overstock count, as reflected in the Superintendent's November 14, 1994, letter and bills, was 14 animal units for range unit 229 and 56 animal units for range unit 446.

Appellants appealed to the Area Director, who affirmed the assessment with a modification on December 23, 1994. The Area Director's decision stated in part:

We feel [appellants] have had sufficient time to come into compliance with their total carrying capacities as agreed upon in July 1994; however, we feel the November overstock calculations are in error. Since two months overstock payment was agreed upon in July, the November bill should be calculated using ten months overstock rather than twelve.

The corrected bill on range unit 229 should be:
 $14 \times 7.80 \times 1.5 \times 10 = \1638.00

The corrected bill on range unit 446 should be:
 $56 \times 7.80 \times 1.5 \times 10 = \$6552.00.$

(Area Director's Dec. 23, 1994 Decision at 2).

Appellants appealed this decision to the Board.

Parties

[1] In the pre-docketing notice for this appeal, the Board requested the Area Director to furnish the names and addresses of the landowners, who

^{4/} The Area Director's decision states that Lopez agreed to pay \$3,720.60 "for 159 animal units overstocked for two months plus the 50 percent penalty" (Area Director's Decision at 2). No further details of the settlement negotiations are included in the record.

are interested parties to this appeal. The Area Director filed a response, stating that there are 902 individual landowners in this case. He also stated that, owing to a high degree of fractionation, many range units on reservations in the Aberdeen Area have owners numbering in the several hundreds. Because of the burden of serving such a large number of owners, the Area Director stated that, with the assistance of the Field Solicitor, he had developed a policy for the Aberdeen Area office to employ in appeals such as this one. The policy is that "the Superintendent shall act on behalf of individual landowners and no further notification will be required in appeals from Administrative Actions when authorities are in file, signed either by the individual landowner or the Superintendent on their behalf as defined in 25 CFR 166.9(a)" (Area Director's Feb. 6, 1995, Letter to the Board at 2). As support for this policy, the Area Director cited, inter alia, BIA Form No. 5-5525, "Authority to Grant Grazing Privileges on Allotted Land," a form which individual landowners sign to authorize BIA to include their lands in a range unit. The form states in part:

I hereby authorize the Superintendent of the said Indian Agency to accept this authority and to enter into agreements with prospective permittees, on approved forms, for the grazing of livestock upon the following lands at not less than the following rates per cow-month based upon the estimated grazing capacities of the land.

* * * * *

And I do hereby agree to grant any permittee reasonable right-of-way over the above allotments, provided I shall receive reasonable compensation, including payment of any damages done or incurred through such right-of-way. The Commissioner of Indian Affairs or his representative shall definitely determine what shall be considered reasonable damages.

The Board agreed that the language of this authorization was sufficient to authorize the Superintendent to represent the interests of the individual landowners in this appeal. ^{5/} Accordingly, the Board did not require service of appeal documents on the landowners.

Discussion and Conclusions

Appellants dispute BIA's assessment of damages with respect to both range unit 229 and range unit 446. They state that, in the fall of 1994, they moved cattle from range unit 373 to range unit 229 solely for the purpose of sorting and weaning calves, not for the purpose of grazing. They state further that the cattle from range unit 373 were present on range unit 229 only for approximately 3 days. In these circumstances, they contend, there was no overstocking, and thus BIA erred in assessing damages for range unit 229.

^{5/} The Board noted, however, that whether or not representation of the landowners by the Superintendent would be appropriate in any given case might depend upon the issue in the case.

Appellants do not specify the dates upon which the sorting and weaning operation was conducted. For purposes of this decision, the Board assumes that it was in progress on October 25, 1994, the date on which BIA conducted a compliance check on range unit 229.

It appears likely that the 110 head of cattle found in a corral, which the Superintendent deducted from the overstock count for range unit 229, were attributable to this operation. Appellants object that BIA "decid[ed] to assess overstocking penalties for those cattle located outside the corral fence, regardless of the time period of the cattles' presence or the purpose for the cattles' presence on Range Unit #229" (Notice of Appeal at 1-2).

The purpose for which the excess cattle were present on range unit 229 is of no particular relevance here. As the Area Director points out, "it is reasonable to assume that wherever cattle are located, they will graze" (Area Director's Brief at 4). In fact, appellants received a substantial benefit when the Superintendent determined that appellants should not be charged for the 110 head found inside the corral but only for the 14 head found outside.

The Board finds that appellants have not shown error in the Area Director's assessment of damages for 14 excess animal units found on range unit 229.

Appellants contend that range unit 446 was overstocked by only three head of cattle, rather than 56, as counted by BIA. They contend further:

The Land Operations operative stated to Mr. A. Lee Lopez that he had counted the cattle on Range Unit # 446 from approximately 1/4 of a mile away, through binoculars. In addition, the Land Operations operative admitted to Mr. A. Lee Lopez that he had added an additional 23 head of cows located on another Range Unit, # 444, as that pasturing agreement was going to expire in six days and he didn't think that they had any grass for those 23 head of cows.

(Notice of Appeal at 2).

Appellants suggest, but do not specifically contend, that the "Land Operations operative" miscounted the cattle on range unit 446 because he made the count with binoculars from a distance of 1/4 mile. Appellants do not support their suggestion of error with any evidence or analysis. Without more than appellants provide, the Board declines to conclude that experienced personnel would be unable to produce an accurate count under these circumstances. 6/ In this case, four individuals participated in

6/ For purposes of this decision, the Board assumes that a BIA employee told appellants that he had counted cattle through binoculars from a distance of 1/4 mile. The Board notes, however, that appellants did not produce the name of the individual alleged to have made the statement until they filed their reply brief.

the stock count made on range unit 446 on October 24, 1994. Each of the four signed the report, under a certification reading: "I hereby certify that the above stock were counted on the date mentioned and that the above is a true and correct count." The Board finds appellants' suggestion of error insufficient to overcome this certification.

Appellants also suggest that BIA included 23 animal units found on range unit 444 in the count for range unit 446. The Superintendent's October 27, 1994, letter includes a chart which shows that 31 head of appellants' cattle, comprising 23 animal units, were found on range unit 444, which was not permitted to appellants but was subject to a pasturing authorization. The chart shows that these 23 animal units were in addition to the 56 excess animal units found on range unit 446. It also shows that appellants were not assessed damages for the 23 animal units found on range unit 444. 7/

Appellants produce no evidence that BIA's livestock count on range unit 446 was inaccurate. The Board finds that they have failed to show error in that count.

For the first time in their reply brief, appellants contend that, if they are liable for overstocking damages, they should be required to pay for only 2 months, rather than 10 months.

The Board normally does not consider arguments raised for the first time in a reply brief, e.g., Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149 (1995), because opposing parties have not had an opportunity to respond to the arguments. In this case, however, the Board finds that opposing parties will not be prejudiced if the Board considers the argument, because it is apparent that appellants' argument must fail.

Although it is not entirely clear, appellants may be contending that the 2 months for which they might be chargeable for overstocking damages are June and October 1994, the months in which BIA made compliance checks. Appellants misunderstand the provision of the Range Control Stipulations under which damages were assessed. Paragraph 2 of the Stipulations provides:

[I]f the number of livestock authorized is exceeded, the permittee shall be liable to pay as liquidated damages, in addition to the

7/ It is apparent from the record that BIA was attempting to count appellants' entire herd in order to determine whether appellants had sold off enough cattle to bring their herd within the total carrying capacity of the range units for which they had permits. See, e.g., "Summary of Findings on All Range Units Permitted to Lopez Brothers," Document 2 in the record.

The Superintendent's Oct. 27, 1994, letter shows that, at the time of the October 1994 compliance checks, the total number of appellants' livestock found on the four range units permitted to them (i.e., excluding the 23 animal units found on range unit 444) exceeded the total carrying capacity of the four range units by 31 animal units.

regular fees for the full-grazing season as provided in the permit, a sum equal to 50 percent thereof for such excess livestock and such livestock shall be promptly removed from the unit. [Emphasis added.]

The grazing season specified in appellants' permits is 1 year. Thus, under paragraph 2 of the Range control Stipulations, the amount due in liquidated damages in this case is 1.5 times the annual fee per animal unit for each excess animal unit.

In his November 14, 1994, decision, the Superintendent calculated damages in accordance with this provision, i.e., based upon the annual fee per animal unit. The Area Director reduced the amount to account for the 2 months for which appellants had already agreed to pay. 8/ The Board finds that appellants have failed to show error in the Area Director's calculation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's December 23, 1994, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

8/ It is not clear whether appellants have yet paid the \$3,720.60 which they agreed to pay following the June 1994 overstocking assessment. Apparently, at the time the Area Director issued his decision in December 1994, they had not yet paid the assessment because BIA has not sent a bill.